Filed 3/8/11 P. v. Ortega CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILSON CHRISTOPHER ORTEGA et al., Defendants and Appellants.	B221799 (Los Angeles County Super. Ct. No. LA059839)

APPEAL from judgments of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Affirmed.

Law Offices of Pamela J. Voich and Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant Wilson Christopher Ortega.

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant Wilmington Ortega.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Wilson Christopher Ortega and Wilmington Ortega appeal from judgments entered after they were tried together for crimes found to be gang-related.[1] Appellants contend that the trial court should have excluded photographs of their gang-related tattoos, as well as the facts underlying crimes committed by other gang members. Appellants also contend that the evidence was insufficient to support the gang finding. In addition, Wilmington contends that his counsel was ineffective for failing to object to evidence that he had been arrested for a violation of his juvenile probation in 2001, and that the prosecution's gang expert gave an improper opinion on an ultimate issue in the case. Wilmington joined in any of Wilson's contentions that might inure to his benefit. We affirm the judgments.

BACKGROUND

1. *Procedural Background*

By amended information, appellants were charged with four felonies alleged to have been committed against Sarai Rodriguez (Rodriguez) on August 3, 2008. Count 1 alleged assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2).[2] Count 2 alleged criminal threats in violation of section 422. Count 4 alleged threatening a witness, in violation of section 140, subdivision (a). And count 6 alleged false imprisonment in violation of section 236.

The amended information specially alleged that in committing the crimes alleged in counts 1, 2, 4, and 6, Wilson personally used a handgun within the meaning of section 12022.5, and that pursuant to section 186.22, subdivision (b)(1)(B), appellants committed the crimes for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members.

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[1] When it is necessary to refer to appellants individually, we shall use their first names to avoid confusion.

[2] All further references are to the Penal Code, unless otherwise indicated.

As to counts 1 and 2, pursuant to sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i) and section 667, subdivision (a)(1), the amended information alleged that Wilson had suffered a prior conviction of a serious or violent felony or juvenile adjudication in Los Angeles County Superior Court case No. LA042067, and pursuant to section 667.5, subdivision (b), that Wilson had not remained free of prison custody on that conviction for five years before committing the current offense.

After a joint trial, the jury returned guilty verdicts against both appellants on counts 1, 2, 4, and 6, and found all special allegations to be true. Wilson admitted his prior conviction and admitted that he had not remained free of prison custody for five years prior to committing the current offenses.

The trial court sentenced Wilson to a total prison term of 23 years, and Wilmington to a total prison term of seven years. Both appellants filed timely notices of appeal.

2. *Prosecution Evidence*

In February 2004, Rodriguez was a witness in a homicide case in which she testified against Wilson, whom she identified as having been involved in that crime. She also testified against Gabriel Medina (Medina) and Jaime Vega in the same case.

Sergeant Daniel Fournier of the Los Angeles Police Department was the investigating officer in the 2004 case and in this case. He testified that Rodriguez came into the station on August 19, 2008, to report the crimes charged here, and that he recorded the interview. The CD of the interview was played for the jury. In it, Rodriguez is heard describing the events of August 3, 2008, as well as a later incident.

In the first incident, Rodriguez stated she was walking with Abraham Morales (Morales) near Tujunga Avenue and Tiara Street between 7:30 and 8:00 p.m., when a person she knew only as "Trigger" pulled up near them in a car, accompanied by several other persons, including Trigger's younger brother, "Little Trigger." She identified Trigger as the person against whom she had testified in 2004. Looking angry, Trigger

got out of the car, took a small black automatic handgun from his pocket, and put it to her head. His companions crowded around her, while some of them pushed Morales away from her and pinned him against a fence. While Trigger held the gun to Rodriguez's head, Mona, one of his female companions, choked her.

Trigger asked Rodriguez whether she remembered him, called her a "*rata*" and a "snitch," and told her he was going to kill her. He told her that the North Hollywood Boyz (NHBZ) had a contract and a "green light" on her, and if his "homies" saw her, they would "smoke" her. Then, Little Trigger, who was acting as the lookout, whistled when the police approached, and everyone scattered.

In addition to Trigger and Little Trigger, Rodriguez recognized members of the Clanton gang, or "C-14" at the scene. She recognized Kathy, who was called "Snoop," Leo, whose nickname was "Little Joker," Victalina, and Mona, whose nickname was "Crazy."[3] At first, Rodriguez thought that the incident was related to her recent quarrel with Mona, but changed her mind when she saw Wilmington take his position as lookout, and because they had been "cool" before, she assumed that he was there to support his brother.

The second incident occurred on August 15, 2008, as she was leaving work. She was approached by a person she knew as "Boo Boo," and some other persons she did not know. Boo Boo pointed a small Glock handgun at her and said such things as, "You know I'm gonna kill you," "I hate your ass," and, "You fucking little bitch." They "threw out" NHBZ and Clanton gang signs, and left when her boss came outside.

When Sergeant Fournier asked Rodriguez to look at some photographs, she said, "[H]old on. They know where my Mom lives." When Sergeant Fournier replied that her mother would have to be moved, Rodriguez told him that they knew where she lived and where her girlfriend lived, and that they had gone to her sister's home and had threatened to kill her.

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[3] Sergeant Fournier explained that the C-14 gang was not a rival of NHBZ. Because they had a common enemy, they were like cousins.

Sergeant Fournier testified that he was the investigating officer in the 2004 homicide case, in which Rodriguez testified against Medina, Jaime Vega, and Wilson. Wilson's moniker was "Trigger," Vega was known as "Boo Boo," and Medina's moniker was "Trippy." Vega and Medina had both admitted to Sergeant Fournier that they were NHBZ members. Trippy was a "shot caller" and "[ran] the show pretty much."

When Sergeant Fournier interviewed Rodriguez on August 19, 2008, she identified Wilson as "Trigger" and as an NHBZ gang member, and told him that she thought the incidents were gang-related. Rodriguez identified Wilmington as "Little Trigger," Medina as "Trippy," and Vega as "Boo Boo." She knew them well, because one of the defendants' roommates had been a friend of hers. Rodriguez identified photographs of Wilson and Wilmington. Sergeant Fournier later telephoned Morales, who corroborated Rodriguez's story.

When Rodriguez testified in this trial, she claimed at times that she did not remember the events of August 3, 2008, and at other times, she denied that they happened. She also claimed that she did not tell Sergeant Fournier about the events. However, she confirmed that the voice speaking to Sergeant Fournier in her recorded police interview was hers, and testified that she had gone to the station voluntarily to speak to him.

Sergeant Fournier had known both Wilson and Wilmington since 2001, although he had had no contact with Wilmington for the past five years. Sergeant Fournier had last spoken to Wilmington about his membership in the gang in 2001, when he arrested him for a probation violation. Wilmington admitted that he was a member of the NHBZ gang, and that his moniker was "Little Trigger."

Sergeant Fournier's last contact with Wilson was in 2008. Prior to 2004, when Wilson was convicted of manslaughter, Sergeant Fournier had arrested him for a probation violation. Wilson admitted at that time, as well as during Sergeant Fournier's other contacts with him in the street, that he was a NHBZ gang member, and that his moniker was "Trigger."

Both Wilson and Wilmington have NHBZ tattoos on their bodies. Sergeant Fournier testified that he had personally seen them, and he produced photographs of Wilson's tattoos.

Sergeant Fournier also testified as the prosecution's gang expert. He had had at least 400 or 500 contacts with gang members, and had been familiar with the NHBZ criminal street gang for 11 years. According to Sergeant Fournier, it was a fairly hard core gang and the primary gang in North Hollywood. It included a "clique" or subset, known as the Tiara Street Locos (TSL). NHBZ had been in existence since the mid-1980's, and had approximately 50 members at the time of trial. Its members usually wrote NHBZ or simply NH for the gang, and TSL for the clique. Its hand sign consisted of the letters NH formed with the fingers.

NHBZ's territory was primarily in the area of Tujunga Avenue and Tiara Street, and extending to other streets in the area. Its primary activities were murder, extortion, robbery, assault with a deadly weapon, and other violent crimes. Sergeant Fournier produced abstracts of judgments showing the 2006 conviction of NHBZ member Jose Anthony Orozco, Jr., (Orozco) for attempted murder committed in October 2004, and the 2007 conviction of NHBZ member Luis Vega (Vega)[4] for a murder committed in August 2005.

Sergeant Fournier was the investigating officer on both cases, and based upon his knowledge of the facts, his opinion was that they were both gang-related. In the first case, Orozco, whose moniker was "Demon," was with a fellow NHBZ member in a car. When another car pulled up next to them, Orozco shot the driver in the head. The shooting took place just south of NHBZ territory.

In the second case, Vega, whose moniker was "Wicked," was involved in a murder committed after the family of a teenage boy reported to the police that the NHBZ

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[4] Vega was the brother of Jaime "Boo Boo" Vega.

gang had been extorting money from them. While gang members were beating the boy in an alley, another teenager came to his rescue and was killed.

After considering the facts in evidence in this case, Sergeant Fournier opined that the crime was committed for the benefit of and in association with a criminal street gang. He explained that the crime would benefit the gang by creating fear and intimidation in the community. This would prevent members of the community from reporting the gang's crimes, which was necessary to the gang's survival. If witnesses felt comfortable coming forward, gang members would all end up in jail and the gang might cease to exist. Therefore, gang members find it very important to retaliate against "rats" or "snitches."

Sergeant Fournier was also of the opinion that the assault and criminal threats against Rodriguez would benefit NHBZ and the TSL clique. The area of Tujunga Avenue and Tiara Street was the center of NHBZ territory, and members would be expected to enforce their turf rights. Because Rodriguez had "ratted" on the gang, the fact that she was walking in its territory was like a slap in the face to the gang and the member she helped send to prison. Any member of the gang would be expected to respond to such transgression to preserve his credibility in the gang. Rodriguez should not be allowed anywhere near that area. Sergeant Fournier did not know whether Wilmington was still an active member of the gang, but unless he had been "jumped out" of the gang, he would still be expected to be supportive of other gang members.

3. *Defense Evidence*

Morales testified that he spoke with Sergeant Fournier in mid-August 2008 about an incident involving Wilson, but he claimed that no such incident occurred. Morales denied that he had ever been threatened by Wilson or Wilmington, and claimed that on the day in question, he was not in the vicinity where the incident occurred. He testified that he had had no contact at all with Wilson or Wilmington on August 3, 2008. In the remainder of his testimony, Morales denied or claimed not to remember each statement allegedly made in an interview with Sergeant Fournier.

Iris Martinez testified that Wilson was a friend of the family, and worked for her father-in-law. She had met him through her husband about six or seven years earlier. She remembered that on August 3, 2008, she was at home preparing a fundraising dinner. Wilson arrived there between 2:00 and 3:00 p.m. and stayed until approximately 11:00 p.m. Mrs. Martinez acknowledged that she learned of Wilson's arrest for a crime committed the day of her fundraiser, but did not go to the police or district attorney with the alibi information.

Mario Jose Gonzalez Valdivia testified that he had known Wilson for two years. When he gave a dinner at Iris Martinez's house to help elderly Nicaraguans, Wilson arrived at 3:00 p.m., and left around midnight.

Rogelio Contreras testified that he had known Wilmington for three or four years, and lived in the same apartment building as Wilmington in Canoga Park. On August 3, 2008, Wilmington helped him repair his car in the building's parking area, beginning at 10:00 a.m. He stayed for 20 minutes, and then came back to check on him throughout the day. The last time he checked was 6:00 or 7:00 p.m., as it was getting dark. As Contreras returned to his apartment at that time, Wilmington was talking to a man who was repairing his motorcycle. Contreras did not see him after that.

4. *Rebuttal*

Sergeant Fournier testified that he spoke to Morales by telephone on August 20, 2008, and although Morales identified himself as Anthony Morales, rather than Abraham Morales, Sergeant Fournier recognized his voice when he testified at trial. Morales told him that as he was walking near Tiara Street between 8:00 and 9:00 p.m. in early August 2008, a black car pulled up, and Mona, Trigger, and others got out, while Rodriguez looked nervous. Two of them pinned him against a fence while Mona grabbed Rodriguez around the neck and pinned her against the fence. Trigger, who was known in the neighborhood by that name, pulled out a gun, put it within two or three inches of Rodriguez's head, and threatened her. He said, "You fucking bitch, you rat. I know what you are doing, I know who you are talking to[.] You are a fucking bitch[.] I can kill you

and whoever you're fucking talking to." He then told Morales that he knew what he looked like.

Sergeant Fournier asked Morales to come to the station for an interview and to look at some photographic lineups, but he never came in, and did not cooperate.

DISCUSSION

I. Effective Assistance of Counsel (Wilmington)

Wilmington contends that the prosecution improperly presented Sergeant Fournier's testimony that he had been arrested in 2001 for a parole violation. He argues that the evidence served no purpose other than to impugn his character and show his criminal propensity.

Evidence of bad character may be excluded upon objection. (See Evid. Code, § 1101, subd. (a); *People v. Thomas* (1992) 2 Cal.4th 489, 520.) If a timely and specific objection was made, the erroneous admission of such evidence is reviewable on appeal. (Evid. Code, § 353.) Wilmington acknowledges that there was no objection, but contends that there could be no logical or tactical reason for his attorney not to have done so, and seeks reversal on the ground of ineffective assistance of counsel.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–674; see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Wilmington argues that the evidence "undoubtedly" confused the jury, and diverted its attention from the weakness in the prosecution's case due to Rodriguez's

reluctance at trial to incriminate appellants. But Wilmington points to no evidence in the record suggesting that the jury was confused, and it is unlikely that the jury's attention was diverted from considering any weakness in the prosecution's case. The testimony regarding the arrest was brief and suggested only an unknown juvenile offense many years earlier. Sergeant Fournier testified that the arrest had taken place seven years earlier, when Wilmington was "a kid," and he had had no contact with Wilmington since then. Nor did Sergeant Fournier have any documented evidence of Wilmington's current gang membership.

Moreover, Rodriguez's testimony did not weaken the prosecution's case—quite the opposite. In her interview, Rodriguez expressed concern that appellants knew where she lived, and where her girlfriend, mother, and sister lived. She was worried for them and for her niece. Rodriguez's recorded interview, given voluntarily just two weeks after the incident, was not weak evidence, and at trial, her denials and forgetfulness reflected her fear, not a lack of credibility.

In sum, we agree with respondent that Wilmington's argument does not show a reasonable probability that the result of the trial would have been favorable absent any alleged attorney errors. Thus, appellant's claim of ineffective assistance of counsel must fail.

II. Expert Opinion

Wilmington contends that it was improper to ask for Sergeant Fournier's opinion on the gang issue without posing the question as a hypothetical. He also contends that the trial court erred in permitting Sergeant Fournier to render an opinion as to whether the crimes were committed for the benefit of the gang, because that was an ultimate issue to be decided by the jury.

Sergeant Fournier answered yes to the following two questions: "Now, you've been present during the trial when we had the testimony of Sarai Rodriguez; right?" and, "And you listened to everything she had to tell us?" The prosecutor then asked, "Now, based on that as well as your conversation with Sarai Rodriguez and the other

information you provided to us, do you have any sort of opinion whether or not this crime that's been described was committed by each defendant for the benefit of, at the direction of or in association with a criminal street gang?" After this question, Wilmington's counsel interposed the objection that the question went to the ultimate issue and was therefore improper. The objection was overruled. Sergeant Fournier then testified: "Yes, I believe it was to benefit the North Hollywood Boyz criminal street gang."

There is no requirement that every expert opinion be based upon a hypothetical. (See Evid. Code, § 801.) It may be based upon either a hypothetical, facts personally perceived by the expert, or facts made known to him at the hearing. (*People v. Sundlee* (1977) 70 Cal.App.3d 477, 484.) As the investigating officer, Sergeant Fournier had obtained the facts of the case in his interview with Rodriguez and his telephone conversation with Morales, and he had heard Rodriguez's trial testimony. At the time of Wilmington's objection to the opinion, the prosecutor pointed out to the court that a hypothetical would simply repeat all the facts that Sergeant Fournier and the jury had just heard. As the prosecutor asked, rhetorically, "What is the value of that?" We agree that under the circumstances the form of the question was not error.

Nor do we conclude that Sergeant Fournier's opinion was improper. Expert testimony may be admissible even though it encompasses an ultimate issue in the case, and even if that ultimate issue is whether the crime benefited the gang. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506–507.) As the California Supreme Court has recently said,"[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1). [Citations.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 63 (*Albillar*).) The Court cited, as examples, *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354, and *People v. Romero* (2006) 140 Cal.App.4th 15, 19. It is within the court's wide discretion to determine whether to admit such testimony and its determination will

not be reversed on appeal unless clear that the court abused its discretion. (*People v. Valdez, supra,* at p. 506.)

Wilmington relies in large part on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), to argue that an expert is prohibited from giving an opinion on an ultimate issue. However, the court in *Killebrew* recognized that there is no "bright line," or "'hard and fast rule'" prohibiting expert opinion on an ultimate issue. (*Id*. at pp. 651–652, quoting *People v. Wilson* (1944) 25 Cal.2d 341, 349.)

In *Killebrew*, the expert's opinion was improper, because it was the only evidence of the defendant's involvement in the crime. (*Killebrew, supra,* 103 Cal.App.4th at pp. 648–649, 658.) Here, unlike in *Killebrew*, Rodriguez's statements established the elements of the crimes. In her recorded statement, Rodriguez stated that she had testified against Wilson, Wilmington's brother, and that Wilmington participated in the crime against her by acting as lookout and signaling when the police arrived. Wilson considered Rodriguez a "snitch," and told her that NHBZ had a contract out on her.

Further, Sergeant Fournier testified from his personal knowledge that NHBZ's primary activities included assault with a deadly weapon and other violent crimes. He explained that in gang culture, committing a crime against "rats" and "snitches" would benefit a criminal street gang by creating fear and intimidation in the community, which prevented others from reporting the gang's crimes, thereby contributing to the gang's survival. Sergeant Fournier acknowledged that it had been a number of years since Wilmington admitted to him that he was a member of the NHBZ gang, but explained that even an inactive or less active gang member would be expected to retaliate against a rat or snitch to preserve his credibility in his gang.

We conclude that because sufficient admissible evidence supported the expert's opinion that the crimes were committed to benefit the gang, the opinion was proper. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618; cf. *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193–1194.)

III. Admissibility of Gang Evidence

Appellants contend that the trial court erred in permitting Sergeant Fournier to testify to the extent that he did, about the details of the crimes of Orozco and Vega. Appellants contend that defense counsel attempted by means of pretrial motions and trial objections to keep out gang evidence under Evidence Code section 352, as irrelevant, unduly prejudice and cumulative. Appellants also contend that the trial court erred in permitting the prosecution to present enlarged photographs of Wilson's tattoos because they were "irrelevant," "cumulative," and "prejudicial" (Wilson), and "unnecessarily graphic" (Wilmington).[5]

A. Details of Crimes by Other Gang Members Properly Admitted

Respondent contends that appellants have forfeited any challenge to Sergeant Fournier's testimony regarding the facts underlying the crimes committed by Orozco, because appellants failed to object to the testimony. We agree.

"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548; Evid. Code, § 353, subd. (a).) Here, there was no objection to the admission of the facts underlying Orozco's crime. Wilmington's counsel objected to Sergeant Fournier's opinion that their crimes were gang-related, and that there was no foundation. In response, the prosecutor asked Sergeant Fournier what it was about Orozco's crime that made him believe that it was gang-related. He replied that he had personally investigated the crime, and then he gave, without objection, the factual details that appellants challenge here. As appellants did not further challenge the admission of that evidence, they have not preserved this issue on appeal.

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[5] Wilson appears to contend in his opening brief that the trial court should not have admitted any gang evidence at all. However, in reply to respondent's argument against that point, Wilson clarifies that his argument primarily addressed the enlarged photographs and posters.

Respondent contends that appellants also forfeited their challenge to the facts underlying Vega's crime. We agree.

Attempting to lay a foundation, the prosecutor had asked Sergeant Fournier what it was about Vega's crime that made him believe it was gang-related. After Sergeant Fournier gave the details of that crime, Wilmington's counsel objected and moved to strike the testimony on the grounds of relevance and Evidence Code section 352. Counsel explained that her previous objection on the basis of foundation had sought only facts showing Sergeant Fournier's personal knowledge. She continued: "My objection now is that—that the foundation's been laid, it's been established that it is related to North Hollywood Boyz, and I don't think that we need to get into the facts, the underlying facts of any of these convictions." The court replied: "If your objection's satisfied, then I think you can go on." The prosecutor said, "Okay," and then the court also said, "Okay," but neither defense counsel replied, and the testimony continued.

It appears from the quoted exchange that the trial court believed that the issue had been resolved, and neither overruled nor sustained the objection. As appellants did not press for a ruling, the issue was not preserved for review. (*People v. Braxton* (2004) 34 Cal.4th 798, 813.)

B. No Objection to Photographs

Appellants contend it was error to admit photographs of their tattoos, but neither appellant refers to any objection in the record, other than the motion in limine by which they sought to exclude evidence that they were gang members.[6] A properly directed motion in limine may satisfy Evidence Code section 353's requirement of a timely objection expressing the specific ground sought to be urged on appeal. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) "However, the proponent must secure an express ruling from the court. [Citation.]" (*Ibid.*)

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6 In addition, the motion in limine sought to exclude Rodriguez's out-of-court statement.

It could be said that the motion in limine generally touched upon the admissibility of the photographs of appellants' tattoos, because they were admitted as evidence of gang membership, a ground of the motion in limine. However, there was no ruling on the admissibility of the photographs, and no specific objection to them at the time they were presented in Sergeant Fournier's testimony. Indeed, at the time they were admitted into evidence, appellants expressly waived any objection. Thus, the issue has not been preserved for review. (*People v. Ramos, supra*, 15 Cal.4th at p. 1171.)

IV. Substantial Evidence Supports the Gang Enhancement

Both Wilson and Wilmington contend that the evidence, other than Sergeant Fournier's opinions, was insufficient to support the allegation that the crimes were committed for the benefit of or in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members.

A gang enhancement finding is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*).) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317–320.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Albillar, supra*, 51 Cal.4th at p. 60.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*Ibid.*)

Section 186.22, subdivision (b)(1), has two prongs, *both* of which the prosecution must prove: (1) The crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; *and* (2) the crime was committed with the

specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Appellants challenge both prongs.

A. First Prong: In Association with or to Benefit a Gang

Evidence establishing that the crime was committed with another gang member will support a finding that it was committed in association with a gang. (*Ochoa*, *supra*, 179 Cal.App.4th at p. 661; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1196.) Thus, evidence that a gang member has committed a crime with another person whom he knows to be a fellow gang member will support the first prong. (*People v. Morales*, *supra*, at p. 1198.)

Appellants contend that associating with each other was insufficient, arguing that the evidence did not establish that they were still gang members. Viewing the evidence in the light most favorable to his position, Wilmington argues that he was not a gang member and did not associate with NHBZ members, as shown by evidence that he was "just a 'kid'" when he admitted his gang membership, and that he no longer lived in NHBZ territory. He also argues that associating with his own brother should "flatly be ignored" as evidence of associating with another gang member. Both appellants contend that the prosecution was required to prove that they were *active* gang members. Although active participation in a gang is an element of the crime described in section 186.22, subdivision (a), it is not a requirement of the enhancement alleged pursuant to section 186.22, subdivision (b)(1.) (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.) Moreover, Sergeant Fournier testified that even gang members who have not been active for a number of years would be expected to support another gang member who commits a crime in his company, unless the inactive member had actually been "jumped" out of the gang.

There was no evidence here that either appellant had been jumped out of the gang. "[R]eversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]" (*Albillar, supra,* 51

Cal.4th at p. 60.) Furthermore, because many gang members have relatives in the same gang, discounting gang affiliation simply because a gang member commits a crime with a relative "would substantially eviscerate the gang enhancement." (*Id.* at pp. 61–62; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 163.)

Substantial evidence supported a finding that both Wilson and Wilmington were members of the NHBZ gang, and that they committed the crimes in association with each other. They had both admitted their membership to Sergeant Fournier. They sported multiple tattoos associated with the gang, and committed the crimes together in NHBZ territory. Although Wilmington did not live in NHBZ territory, he associated with his brother, a NHBZ member, for whom he acted as lookout while Wilson assaulted Rodriguez in NHBZ territory.

We are satisfied that substantial evidence supported a finding that the crimes benefitted the gang. Wilson called Rodriguez a snitch and a *rata*. He told her that NHBZ had a contract and a "green light" on her, and if his "homies" saw her, they would kill her. Sergeant Fournier testified that gangs created fear and intimidation in the community and retaliated against snitches, in order to prevent them from reporting the gang's crimes; such conduct benefitted the gang and promoted its survival by keeping gang members out of jail.

B. Second Prong: Specific Intent

Appellants contend that there was insufficient evidence to establish the second prong of the enhancement: the "specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).)

Wilson contends that the *direct* evidence was insufficient to establish that he intended to benefit the gang. He points to evidence that he and Vega had recently been released from prison in a case in which Rodriguez had testified against them; they both expressed anger toward Rodriguez when they assaulted her; appellants made no gang gestures, nor did they wear gang attire. Wilson also claims that appellants did not make "statements indicating defense of gang turf, and no reference to gang activities or

business." Wilson argues that Sergeant Fournier's opinion should be discounted, because it was based "exclusively on his general experience with criminal street gangs." Thus, he argues, the jury should have found that he acted on a personal vendetta and intended only to benefit himself.

There is no rule that only direct evidence may support a judgment, as Wilson suggests. (See *People v. Stanley* (1995) 10 Cal.4th 764, 792–793.) A gang finding may be based upon circumstantial evidence, and "[i]t is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

Had Wilson acted alone, or had there been no substantial evidence of benefit to the gang, he might have had a better argument in favor of a personal vendetta. (See *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.) As we have found substantial evidence to support a finding that the crimes benefitted the gang, reversal cannot be justified by the possibility that the evidence might have been reconciled with a finding that Wilson acted for personal reasons only. (See *Albillar*, *supra*, 51 Cal.4th at p. 60.)

In any event, we disagree that Wilson made no statements regarding gang activities or business. He told Rodriguez that NHBZ and "we" had a contract and a "green light" on her, and that if his "homies" saw her, they would kill her. Wilson made it clear that he was speaking for his gang, not simply satisfying a personal desire for revenge.

Wilmington contends that the prosecution was required to show that he willfully promoted the gang. However, he relies on authority defining the element of active participation in a criminal street gang, for purposes of the street terrorism offense under section 186.22, subdivision (a). (See *People v. Castenada* (2003) 23 Cal.4th 743, 749; *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1259–1260.) Under the enhancement provision of section 186.22, subdivision (b)(1), "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a

gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.)

Wilson contends that Sergeant Fournier's opinion was the only evidence of the requisite specific intent. We disagree. In her recorded statement Rodriguez is heard to explain that while Wilson's companion choked her, Wilmington acted as lookout, and Wilson held a gun to her head and threatened to kill her. Given appellants' relationship to each other, their monikers, their gang tattoos, and their commission of crimes together in gang territory, there is no likelihood that either was ignorant of the other's membership in the gang.

Wilmington contends that the prosecution presented only "very weak evidence that [he] may have acted as a lookout." On the contrary, Rodriguez stated that Wilmington positioned himself to act as the lookout, and whistled when the police approached, causing the assailants to scatter. Wilmington also contends that such evidence showed no more than aiding and abetting, which he suggests cannot establish the necessary specific intent. We disagree. The necessary specific intent may be inferred from aiding and abetting a felony, if the crime was committed by a known gang member. (See *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.)

In sum, viewing the evidence in the light most favorable to the verdicts, we conclude that substantial evidence established that appellants committed the crimes together, knowing that the other was a member of the NHBZ, with the specific intent to assist criminal conduct by the other, and with the specific intent to benefit the gang by discouraging testimony against members.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ